No. 80-1842

# In the Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL BIFIELD, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court erred in not ordering a psychiatric examination to determine if petitioner was competent to stand trial.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported. The opinion of the district court is reported at 498 F. Supp. 497.

### JURISDICTION

The judgment of the court of appeals was entered on April 6, 1981. The petition for a writ of certiorari was filed on April 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. app. 1202(a)(1). He was sentenced to a term of two years' imprisonment (Pet. App. 1b-2b). The court of appeals affirmed (Pet. App. 2a). Petitioner does not challenge the sufficiency of the evidence.

On the day the trial was scheduled to begin, petitioner personally addressed the court and said that he wished to discharge his attorney and hire another attorney (Tr. 2-3).[1] He said that he had been told by the attorney he intended to hire to ask for a continuance of "maybe a week" (Tr. 5) to arrange to hire the new attorney (Tr. 3, 4-5). He gave no other reason for seeking a continuance. At one point the court asked petitioner when he had concluded that he needed a new attorney, and petitioner replied (Tr. 3-4):

> Yesterday, when I sat down and met with a few people. Okay? We sat down and talked.
>
> Because everything went all right in the State Court, as far as I could see, you know. And I'm not an attorney. And, like, I've been confused, I have a lot of pressure in my brain, a lot of things in my brain, a lot of things have happened to me. So this is what I wanted you to hear.
>
> And I'd like to fire Mr. Diorio [petitioner's trial counsel]; I don't want him as an attorney. No disrespect to Mr. Diorio, or nothing like that. And I want to hire another attorney.

[1] "Tr." refers to the trial transcript.

The judge then asked the attorneys to approach the bench. Petitioner's counsel began by saying, "This is as much a surprise to me as it is to the Court, your Honor" (Tr. 7) and said that what petitioner told the court was "all I know about it" (Tr. 8). The government opposed the request for a continuance, pointing out that the trial had already been postponed several times, that petitioner had seen his attorney perform at a suppression hearing some time earlier, that petitioner gave no adequate reason for having just decided his attorney was inadequate, and that a continuance would significantly inconvenience government witnesses (Tr. 9-11). Petitioner's counsel then said (Tr. 14-15):

> I am prepared to go forward. The problem is with this unexpected turn, it puts [me in] a difficult situation * * *.
>
> * * * * *
>
> I feel like I have now somehow a credibility gap. I need the cooperation of my defendant. * * *
>
> * * * * *
>
> But it appears through talking to friends and people * * * he feels that his best interests would not be served by me. Knowing that he has that reservation makes it very difficult for me to adequately represent him with his cooperation.

The district judge, however, said that "[t]here's nothing to suggest that you're not going to have his cooperation. * * * [H]e may have expressed some reservations about your ability to be of assistance to him. But I don't think he indicated at any time that he was unwilling to cooperate with his counsel. Indeed, I believe he suggested he would be very cooperative" (Tr. 16). After petitioner's attorney again remarked: "I was prepared to try the case and I

wasn't asking to be withdrawn" (Tr. 18), the judge denied the motion for a continuance (Tr. 19), explicitly "recogniz[ing] the importance of having a defendant have counsel of his own choosing" (Tr. 20) but citing the many delays in the history of the case (Tr. 20, 23). Petitioner's counsel suggested that petitioner might wish to proceed without an attorney, but the court rejected this suggestion (Tr. 20-21). Petitioner's attorney then requested, and was granted, a five-minute recess in which to consult with petitioner and explain the judge's ruling (Tr. 20-21, 23).

After the recess, petitioner's attorney stated to the court that petitioner had been apprehended a few days earlier, apparently in connection with another offense, and had "receive[d] some injuries to himself, including blows to the head" (Tr. 25-27):

> It's my opinion, having known Mr. Bifield for a period of time, that he is somewhat less organized than usual, and your Honor can hear by his speech and his manner of conversation that his thoughts aren't flowing properly.
>
> Mr. Bifield tells me that he would like to try the case by himself, that he doesn't want to have me represent him, that he'd like to get other counsel, and he honestly in my opinion doesn't really seem to understand all about the case at the present time.
>
> I would respectfully suggest to the Court that it's not for any comfort to myself or any convenience to myself, that perhaps a 24-hour continuance to allow him to discuss it with other counsel and perhaps get some rest and some medical attention.
>
> * * * * *

> [I]n State Court last week * * * the Judge ordered from the bench that because of visible injuries he be given medical attention. He wasn't given that attention. He was seen by someone in a jail infirmary, was incarcerated for a couple of days, and presently is seeking medical attention, and probably some lack of confusion in his own life.

The judge replied that he was "surprised" that counsel had not raised any issue about petitioner's injuries or need for medical attention at the side bar conference (Tr. 27). The judge then explained to petitioner his decision to deny a continuance, specifically mentioning an earlier continuance and the inconvenience it caused to jurors (Tr. 28-30). Petitioner then said (Tr. 32-33):

> Well, I listened to you, what you said, that I had continuances and the State's four Jurors, or something, didn't show up. It's on both sides. Okay?
>
> I went through a lot of things. I was beat up by the same officers that were involved in this case. I was provoked. All right?
>
> I'm going through a lot of changes in my head. Okay? I got up, I get dizzy. This morning I had a hard time getting here. It's my fault, I've been sleeping, I've been resting three days. A Court or a Judge ordered me to go to get medical exam, and I was thrown in a room with two other inmates. I was just thrown on a metal bed. Okay? I was really hurting, and I was thrown in.
>
> I had to go through all this aggravation for three whole days. And finally, everybody said, "Oh, it don't look that bad," and I'm hurt. And boom, then I was released from jail. Oh, yeah.

Petitioner then repeated that he wanted a new attorney (Tr. 33-34), that he felt his attorney was not "adequately prepared," and that he was "getting railroaded" (Tr. 34). The case then proceeded to trial (Tr. 35).

On appeal, petitioner claimed that the judge erred in not ordering a psychiatric examination under 18 U.S.C. 4244. The court of appeals rejected petitioner's contention (Pet. App. 3a) and affirmed his conviction (*id.* at 2a). The court noted that petitioner "was responsive to the court and * * * understood the remarks made by his counsel," that he "engaged in no inappropriate behavior during trial," that his attorney did not report any difficulty in communicating with him, and that "no further claim was made of any mental incapacity" of petitioner (*id.* at 3a). The court cautioned that reports of serious untreated head injuries would ordinarily raise a question about the need for an examination, but it held that petitioner was competent to stand trial and that the district court had not abused its discretion in declining to order an examination (*ibid.*).

## ARGUMENT

1. Petitioner's sole contention is that the district court erred in not ordering a psychiatric examination under 18 U.S.C. 4244. Petitioner acknowledges (Pet. 9) that Section 4244 was not explicitly invoked; neither petitioner nor his attorney filed the "motion for a judicial determination of [the] mental competency of the accused" required by Section 4244. Nevertheless, petitioner contends (Pet. 9) that the remarks he made to the district court "presented" "the issue of the [petitioner's] competence to stand trial" in a way that required the court to order a psychiatric examination.

This contention is without merit. Neither petitioner nor his attorney ever requested a psychiatric examination, and neither petitioner's own statements to the district court nor his attorney's statements drew petitioner's competence into question. In the colloquies that occurred before the recess, petitioner's attorney said that he was fully prepared to go to trial and was surprised by petitioner's request for a continuance. This affirmatively suggests that petitioner's attorney had no reason to believe that petitioner was unfit to stand trial. Both petitioner and his attorney viewed petitioner's decision to change attorneys as the product of calculation and discussion with others—not as a manifestation of severe irrationality or a psychological difficulty. Petitioner's attorney was concerned that petitioner might be uncooperative not because of any mental problem but because petitioner wanted a different attorney. Indeed, petitioner's counsel even suggested that petitioner might wish to represent himself; at that time, had petitioner's attorney been concerned that petitioner was not competent, he would surely have expressed doubts about petitioner's ability to represent himself.

The petition quotes (Pet. 5), wholly out of context, petitioner's comments about " 'pressure in my brain, a lot of things in my brain[.]' " Even the immediate context of this remark makes it clear that petitioner was attempting to explain his failure to seek another attorney sooner by saying that the rush of events had confused him and that he had not adequately reflected on them. The larger context of the colloquies that occurred before the recess—colloquies that focused exclusively on petitioner's requests for a continuance and new counsel—leaves no doubt that petitioner was not referring to a psychiatric problem.

After the recess, petitioner and his attorney did refer to petitioner's condition. But they said only that petitioner had injuries and needed rest and medical attention. Petitioner's counsel said that a continuance of 24 hours would be adequate; petitioner himself appeared to believe that rudimentary medical care would suffice. Neither referred in any way to mental or psychological problems. Neither suggested that petitioner needed a psychiatric examination; neither used the term "competence." Although petitioner's counsel said that petitioner was not as lucid as he ordinarily would be and did not fully understand the case, the remedy petitioner's counsel proposed—a brief rest and care for the injuries—makes it clear that counsel thought these difficulties were only a very temporary consequence of petitioner's physical injuries. In any event, counsel's other remarks, particularly before the recess, are wholly inconsistent with any suggestion that counsel was questioning petitioner's competence to stand trial. Petitioner's references to dizziness and "a lot of changes in my head" were part of a list of misfortunes petitioner compiled in attempting to persuade the judge to grant a continuance. Petitioner, too, apparently thought they were the temporary result of his injuries. And in any event, occasional dizziness and "changes in my head" do not constitute incompetence to stand trial.

In sum, nothing said by either petitioner or his trial counsel raised a significant question about petitioner's "ability to consult with his lawyer with a reasonable degree of rational understanding" or his "rational as well as factual understanding of the proceedings against him" (*Dusky* v. *United States*, 362 U.S. 402, 402 (1960)). Nothing they said can be construed as a request for a psychiatric examina-

tion. In these circumstances, the district judge had no obligation to order such an examination under 18 U.S.C. 4244. See, *e.g.*, *United States* v. *Oliver*, 626 F.2d 254, 258 (2d Cir. 1980); *Rose* v. *United States*, 513 F.2d 1251, 1255 (8th Cir. 1975); *United States* v. *McEachern*, 465 F.2d 833, 837-839 (5th Cir. 1972).

2. According to petitioner (Pet. 8-9), the Ninth Circuit takes the position that a district judge must grant a defendant's first motion for a psychiatric examination under 18 U.S.C. 4244. See *United States* v. *Ives*, 574 F.2d 1002, 1005 & n.3 (9th Cir. 1978); *Meador* v. *United States*, 332 F.2d 935, 937-938 (9th Cir. 1964). But petitioner did not request such an examination; even in the Ninth Circuit, no examination would have been required because the issue of competency was not "properly raised" (*United States* v. *Cook*, 418 F.2d 321, 324 (9th Cir. 1969)). Moreover, in the Ninth Circuit, a district judge apparently need not order an examination *sua sponte* under 18 U.S.C. 4244 unless there is " 'substantial evidence' " of incompetence—" 'evidence * * * rais[ing] a reasonable doubt about the defendant's competency to stand trial.' " See *United States* v. *Clark*, 617 F.2d 180, 185 (9th Cir. 1980), quoting *De Kaplany* v. *Enomoto*, 540 F.2d 975, 980-981 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977), quoting *Moore* v. *United States*, 464 F.2d 663, 666 (9th Cir. 1972). Thus petitioner would not have been entitled to a psychiatric examination in the Ninth Circuit, and the conflict between circuits alleged by petitioner is not presented by this case.[2]

[2] In any event, in the Ninth Circuit a failure to hold a hearing under Section 4244 would be harmless error unless the defendant was in fact incompetent. See *United States* v.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

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*Clark, supra*, 617 F.2d at 185 n.8; *United States* v. *Makris*, 483 F.2d 1082, 1091 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974). Petitioner does not claim that he was incompetent at trial and advances no evidence of incompetence; the court of appeals specifically held that petitioner was competent and supported its conclusion with evidence. See page 6, *supra*; Pet. App. 3a.

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